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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1099

MARTIN COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

MARTIN COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Martin Cohen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed his conviction for violations of 18 U.S.C. § 201(f) and aiding and abetting (via 18 U.S.C. § 2) violations of 26 U.S.C. § 7214(a)(2), and which affirmed a denial of his motion for a new trial.

The Opinion Below

The opinion of the Court below, which has not yet been officially reported, is found, infra, in Appendix A. The decision of Murphy, J. denying the new trial motion, not officially reported, is found, infra, in Appendix B.

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on December 19, 1967. Timely application for a rehearing and a rehearing en banc, was made and was denied on January 16, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Was it error to permit the joinder of 12 sets (22 counts) of bribery and aiding and abetting (or gratuity) offenses where they were spread over a period of 38 months, and where each set was independent of the others, involved separate acts, five separate recipients, provable by different evidence, and not committed pursuant to a conspiracy?

2. Where an indictment alternatively pleads bribery (18 U.S.C. § 201) and aiding and abetting the receipt of unlawful fees (26 U.S.C. § 7214(a)(2) via 18 U.S.C. § 2) and the proof offered is identical as to each of the two counts of the set, is it reversible error to fail to instruct the jury that it may convict on one but not on both of the counts so pleaded?

3. Was it error to fail to properly charge criminal intent as a necessary element in a prosecution for aiding and abetting the unlawful receipt of fees, and for the giving of a gratuity?

4. Where a bribe was allegedly given by an accountant to a revenue agent during the audit of a tax return, in consideration of the agent overlooking unsubstantiated de-

ductions on the return, was it error to charge the jury that the correctness of the tax return as filed was immaterial?

5. Was it error to fail to dismiss bribery charges where there was no testimony as to corrupt intent of petitioner but only the admittedly hearsay testimony of a revenue agent that the self-introduction of the accountant to the agent meant to the agent that he could expect to receive a bribe from the accountant?

6. Where the government, in preparing a bribery case, visits before trial the taxpayer/clients of the petitioner and obtains statements from them indicating that the items on their tax returns which had allegedly been fraudulently audited in consideration of a bribe paid, were in fact legitimate and substantiated, and where the government fails to disclose such statements at the trial, although requested by the defense to produce them, is such concealment prejudicial error requiring a new trial?

Applicable Constitutional Provisions, Statutes and Rules

Involved herein is the Fifth Amendment; 18 U.S.C. §201 (as effective until January 20, 1963); 18 U.S.C. §201 (b) (effective January 21, 1963); 18 U.S.C. §2, and 26 U.S.C. 7214(a)(2) (Appendix C); also, Rules 8, 14, 33 and 52(b) of the Federal Rules of Criminal Procedure (Appendix D).

Statement of the Case

Petitioner, a certified public accountant, was charged in one indictment with conspiracy (Count 1), eleven counts of bribery (18 U.S.C. §201 and 18 U.S.C. §201(b)) (Counts 2-12), one count of giving a gratuity (18 U.S.C. §201(f) (Count 13), and ten counts of aiding and abetting the unlawful receipt of fees by a revenue officer (26 U.S.C. §7214 (a)(2), via U.S.C. §2) (Counts 14-23).

The conspiracy count was dismissed by the government before the trial commenced; the jury acquitted on all of the bribery counts, and convicted on the gratuity (Count 13) and aiding and abetting counts (Counts 14-23).

The United States Court of Appeals granted petitioner's motion for a remand for the purpose of a new trial motion, which motion was thereafter made, and was denied by Judge Murphy, without a hearing.

The appeal below was from the judgment of conviction and from the denial of the new trial motion.

The Court of Appeals affirmed both branches of the consolidated appeal.

The Government's case consisted essentially of the testimony of five Internal Revenue Service agents who were named as co-defendants with the petitioner, had pleaded guilty before trial variously to conspiracy and to the receipt of fees not prescribed by law, but had not yet been sentenced.

The testimony of the agents is summarized as follows:

Jeremiah Clyne first met petitioner in 1960 when petitioner introduced himself as a friend of Gilbert Sherman,

at an unrelated audit (55).* The next year on February 3, 1961 Clyne conducted an audit of the 1959 McMurtrey return with petitioner (bribery count 8; aiding and abetting, count 20). He was shown some documentation and Clyne disallowed $750. in deductions (57). On March 2, 1961, according to Clyne, petitioner submitted McMurtrey's approval of the settlement and gave Clyne $50. (59).

Clyne also conducted the Altpeter 1960 tax return audit (bribery Count 11; aiding and abetting Count 23) on December 1, 1961. At a conference, substantiation was shown and a disallowance made (61). On January 22, 1962 petitioner appeared for the Davis audit (bribery Count 9; aiding and abetting Count 21) and according to Clyne, asked him for a "no-change", showed substantiation, and then gave Clyne $100. for the Altpeter and Davis matters (62, 70).

Clyne was permitted to state, over objection, what the mention of the name Gilbert Sherman by petitioner upon their first meeting meant to Clyne.**

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* The reference is to the transcript of the record below.

** "Q. What, if anything, did your introduction by the defendant and your conversation, your earlier conversation, with Mr. Sherman mean to you?

Mr. Edelbaum: I object to it.

The Court: I don't quite understand the question. Would you repeat it for me?

(Question read.)

Mr. Edelbaum: I object to the question.

The Court: Would you mind rephrasing it? I get lost on it because it relates to two different things, I guess.

Q. The defendant introduced himself to you; is that correct? A. That's correct.

Q. And he stated he was an acquaintance of Gilbert Sherman; is that right? A. I did.

Q. What did the defendant's use of the name of your mutual friend mean to you when he introduced himself to you?

Lawrence Montello testified that petitioner appeared and requested that he conduct the audit of the 1960 return of the Mooreheads (bribery Count 4; aiding and abetting Count 16). (125). At the audit on November 28, 1961 petitioner showed Montello some substantiation for the deductions claimed, a disallowance was made, although no additional tax resulted. According to Montello, petitioner said he would give him $50. (126, 127). At the end of the audit, according to this witness, petitioner left an envelope containing $50. (127). Thereafter, petitioner allegedly called and asked Montello to obtain the audit file of the Andre 1961 tax return (bribery Count 5; aiding and abetting Count 17). On October 2, 1962 the audit was conducted, at which time Montello made some disallowance after examining the substantiation produced by petitioner (129). According to Montello petitioner thereafter telephoned him and asked that he come to petitioner's office, and when Montello later did so, petitioner gave him an envelope containing the signed Andre consent form and $50. (132).

Erasmo De Sibio testified that he conducted the audit of the Ripley 1959 tax return on December 9, 1960 (174) (bribery Count 3; aiding and abetting Count 15). That petitioner brought some records along and according to De Sibio, said that if he received a favorable audit, there would be something in it. De Sibio made a disallowance

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Mr. Edelbaum: That is objected to, your Honor.
The Court: I don't know. I suppose he should tell—is that the question, what it meant to him?
Mr. Latchford: Yes, sir.
The Court: Do you understand the question?
The Witness: Yes, sir.
The Court: I will allow it. Overruled.

A. It meant to me that I was able to talk to Mr. Cohen and not worry about anything, and if I gave a favorable audit I would probably get paid" (59, 60).

and later on petitioner returned and gave him either $25. or $50. (174-177).

Louis Deitsch conducted the audit of the 1959 Butterfield return on April 10, 1961 (bribery Count 6; aiding and abetting Count 18) and the audit of the 1961 Butterfield return on November 26, 1962 (bribery Count 7; aiding and abetting Count 19). According to Deitsch, petitioner asked for lenient audits and said he would take care of him; and that five weeks after the first audit petitioner gave him $50. and three weeks after the second audit he gave him $25. (212-217).

Jeremiah Ryan testified that he conducted the Paget audit (bribery Count 2; aiding and abetting Count 14) and that petitioner said, according to Ryan, that if they could work out some agreeable thing there would be something in it for him (254). Ryan made a disallowance and some ten weeks later petitioner returned with the signed waiver form and $50. (244, 256). Ryan also conducted the audit of the 1960 Boland tax return (bribery, Count 10; aiding and abetting Count 22), in connection with which, according to Ryan, petitioner told him that there would be something in it for him * * * "if I handled it expeditiously" (257). Ryan was shown substantiation and made a disallowance. Some weeks later, on August 10, 1961 according to Ryan, petitioner returned the signed waiver form with $50. (258). This witness also handled the audit of the 1961 Petrie return (bribery Count 12; gratuity Count 13) on or about June 10, 1963 and stated that petitioner told him that there would be something for him * * * "if we could handle it" (259). He was shown substantiation at the audit and made a disallowance. Later, petitioner, according to Ryan, returned the waiver form with $50. (261).

Portman Paget, the only taxpayer-client of petitioner called by the government, testified that he received from petitioner, his accountant, a form approving the audit of his tax return which had been earlier conducted, together with a bill; that he later visited petitioner and complained about the bill, and that petitioner said, according to Paget, something to the effect " * * * that's for the guy" (303). Paget said that he paid the petitioner's bill of $150. by check (304).

Defense counsel then requested the production of any statements of taxpayer/clients of petitioner; the government at first said it had "nothing at all", and then said that it " * * * had nothing whatsoever which would be exculpatory to the defendant under *Brady* v. *Maryland*" (339).*

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* The full colloquy follows:

Mr. Edelbaum: I have an application to make, Judge: I ask at this time that the government produce for my inspection any statement they have from any of the taxpayers involved in this case that in any way would exculpate the defendant in this case, under Brady v. Maryland, and I particularly address myself as to whether or not there is any statement from the defendant's wife—

The Court: The defendant's wife?

Mr. Edelbaum: I am sorry; the last witness' wife, Mr. Paget's wife, if they have a statement from her.

In view of the fact that the witness has said that his wife was present at the time of this discussion that would lead me to believe that she was surely interviewed and if there is a statement in the possession of the United States Government where this woman denied any such thing took place, I think we are entitled to that under Brady v. Maryland.

The Court: They know their obligations under Brady. If they don't give them to you, they are in trouble. Do you have any material?

Mr. Latchford: No, your Honor, I have nothing at all.

The Court: We will take a short recess. Was there anything else?

In addition to calling character witnesses, petitioner testified in his own behalf, and categorically denied any wrongdoing, the solicitation of favorable treatment, or the payment of any moneys. Further, that he did not discuss Sherman with Clyne, or Clyne with Sherman (405).

Reasons for Granting the Writ

1. Petitioner was indicted on 23 counts (1 of conspiracy, 11 of bribery, 1 of gratuity and 10 of aiding and abetting). These counts dealt with 10 audits relating to 10 clients of Petitioner, five Internal Revenue Service agents and covered a period of 38 months.

The only thread binding them together was the conspiracy charge (Count 1) wherein it was alleged that petitioner and the five Internal Revenue Service agents conspired to violate the bribery, gratuity and receipt of unlawful fees laws. This count was dismissed on the consent of the Government at the outset of the trial. At that point the common denominator vanished, and the separate sets of crimes that remained should not have been jointly tried.*

Mr. Edelbaum: Are you saying that you have no statements from these other people?

Mr. Latchford: No. I am saying that the government has nothing whatsoever which would be exculpatory as to the defendant, under Brady v. Maryland (338, 339).

* "* * * Because they were substantive offences, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence." *McElroy* v. *United States*, 165 U.S. 76, 79, 80; *Schaffer* v. *United States*, 362 U.S. 511, at p. 516; *United States* v. *Spector*, 326 Fed 2d 345 (7 Cir. 1963), *United States ex rel Evans* v. *Follette*, 364 Fed. 2d 305 (2 Cir. 1966); see also Fed. Rules of Crim. Procedure, Rule 8 and Rule 14 (Appendix D).

The trial judge has a continuing duty to grant a severance if prejudice does appear; and no formal motion need be made, *Delli Paoli* v. *United States,* 352 U.S. 232, 241.

The danger in a joint trial has been long recognized and separate trials are constitutionally preferred. *United States* v. *Ketchum,* 320 Fed. 2d 3, 8 (2 Cir. 196). See also: *Milanovich* v. *United States,* 365 U.S. 551 (1961); *Drew* v. *United States,* 331 Fed. 2d 85 (D.C.C.A. 1964); *Cross* v. *United States,* 335 Fed. 2d 987, 989, 990 (D.C.C.A., 1964).

The prejudice to the petitioner is apparent when the number of counts submitted to the jury following the joint trial is considered, and when taken into account is the natural tendency of the jury to find it impossible to disbelieve each and every one of the agents, and to acquit on all counts. Such acquittal would defy the layman's belief that "where there is smoke there is fire".

The economy feature of a single trial does not counterbalance in a constitutional sense, the possibility that the jury might have received the evidence cumulatively and found guilt, when if it had the realistic opportunity of considering the evidence separately, it would have acquitted.

Surely the expense of impanelling separate juries is trivial when measured against the liberty of petitioner.

2. The indictment charged bribery and aiding and abetting (or gratuity) alternatively pleaded in sets of counts. The jury was not charged that it could convict on one but not both of the alternatively pleaded counts relating to the same facts. *Milanovich* v. *United States,* supra, mandates this type of charge. The test is whether the two charges are inextricably bound. They were provable by the same evi-

dence, the only difference being the absence of corrupt intent in the counts other than bribery. Had the jury found petitioner guilty of the bribery charges, it would also have had to find guilt on the aiding and abetting and gratuity charge. Conversely, had the jury acquitted on the aiding and abetting and gratuity charges, it would have had to acquit on the bribery charges.

Had the requisite charge consonant with the intent of *Milanovich* been given, the jury would have had the option of convicting only on one of the two counts in each set, and in light of the result here had, namely acquittal of all bribery charges, it may well be that the jury would have acquitted of all charges, and thus would have avoided a compromise verdict.*

Nothing in the case of *Umans* v. *United States,* 368 Fed. 2d 725 (2 Cir., 1966) cert. granted, 386 U.S. 940 (1967), cert. dismissed, after argument, as improvidently granted, 389 U.S. 80 contradicts the foregoing. *Umans* in this Court did not raise the applicability of the *Milanovich* doctrine.** The Circuit Court of Appeals for the Second Circuit has indicated, *United States* v. *Barash,* 365 Fed. 2d 395, 399 (2 Cir., 1966) that specifically left open was the argument raised herein, and that such argument was not precluded by *United States* v. *Kenner,* 354 Fed. 2d 780 (2 Cir. 1965) cert. den., 383 U.S. 958, because this type of attack was not therein made.

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* The Court below erroneously concluded (A7) that the acquittal on the bribery counts effected a *Milanovich* result, hence there was no prejudice to petitioners even though the *Milanovich* charge was not given.

** Although the Circuit Court held that 18 U.S.C. §201(f) (gratuity) is necessarily included in 18 U.S.C. §201(b) (bribery), and vacated the sentence as to the former.

3. The charge of the trial court as to the gratuity count was insufficient because it removed petitioner's intent as an element.*

Similarly, as to the aiding and abetting counts, the Court merely charged the language of the statute (488, 489, 505, 506); this precise charge has been held inadequate and to constitute reversible error, because of the failure to charge as to intent, even where no objection to the charge was taken, *United States* v. *Byrd*, 352 Fed. 2d 570, 573 (2 Cir., 1965).

The reliance by the Court below in its opinion upon the *Umans* charge as to aiding and abetting is inappropriate, because in that case the Circuit Court held that the charge was erroneous but did not reverse because *Umans*, unlike petitioner, was convicted of bribery as well, (id. at p. 727); as to the gratuity charge, the one given in *United States* v. *Irwin*, 354 F. 2d 192, 197 n. 3 (2 Cir., 1965) materially differed from the one given here as to intent.**

4. The Court charged: "The fact that an audit may have been proper or improper or that the returns were correct or fraudulent or the taxes were due or not due is immaterial in this case" (491). These factors were highly relevant on the question of the motive of petitioner to pay a bribe. If the audit was honest, the returns accurate and substantiated, and no additional tax was due, why would petitioner offer a bribe?

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* "On the gratuity count, the government doesn't have to prove any intent at all, merely that the defendant knowingly and wilfully gave a fee for and because of the audit that was to be conducted." (506, 507).

** The *Irwin* charge stated: "Thus, you are called upon to determine what was in the defendant's mind and the purpose which motivated him in his course of conduct.* * *".

The ruling in *Irwin, supra,* as to the immateriality of the tax returns was expressly limited to the fact that as to the giving of a gratuity (in connection with which defense it was offered), it was irrelevant to *that* offense.

It is relevant, however to the bribery motive and the charge given, undifferentiated as to its applicability to the gratuity count only, constituted prejudicial and reversible error.

Nor can it be said that the error did not substantially sway the jury and affect the result. *Kotteakos* v. *United States,* 328 U.S. 750, 764-765.

As to errors below of a substantial nature prejudicial to petitioner to which objection or exception was not taken, the same are correctible under Rule 52(b) of the Federal Rules of Criminal Procedure.* *Chapman* v. *California,* 386 U.S. 18; *Fahy* v. *Connecticut,* 375 U.S. 85; *Screws* v. *United States,* 325 U.S. 91; *United States* v. *Hines,* 256 Fed. 2d 561 (2 Cir., 1958).

5. Agent Clyne's testimony, over objection, that the mention to him by petitioner of the name of a fellow-employee, Gilbert Sherman, meant to him that he could expect a bribe from petitioner if he conducted a lenient audit, was hearsay, was inadmissible for any purpose, and permitting the jury to hear it constituted reversible error.

A remarkably similar statement was made by an agent in the *Barash* case, (*supra,* at p. 399)** and was there held

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* "PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

** The agent testified he could expect to be paid " * * * because Miss Lupescu never introduced me to anyone except someone who was going to pay me off."

to constitute reversible error because the state of mind of the agent was irrelevant unless induced by Barash, a fact as to which the Lupescu story was hearasy (id. at p. 400). *Barash* was reversed and a new trial ordered by the Circuit Court (2 Cir.) which held that the improper admission of this agent's statement as to the expectation of a bribe from the mere introduction of Barash to him had a "spill-over" effect on the 30 other counts.

It is impossible either to draw any meaningful distinction between that error in *Barash* and the error herein or to account for the diametrically opposed opinions of the same Circuit Court. This is especially evident when in *Barash* the tainted testimony embraced two of 32 counts; in this case it embraced six of 22 counts; in *Barash* there was a conviction on all counts, whereas in this case there was acquittal on half of the counts.

There is nothing in the record other than the erroneously admitted hearsay statement to establish a prima facie case as to any of the Clyne bribery counts (McMurtrey audit, Count 8, Davis audit, Count 9 and Altpeter audit, Count 11). These counts should not have been submitted to the jury and the failure to dismiss them deprived petitioner of a fair trial, notwithstanding the subsequent acquittal on these counts, because of the impact of the error upon the jury in its total deliberation.

6. After indictment and before the trial below, the government sent investigators to the clients of the petitioner, for the purpose of interviewing them and obtaining statements to be used in prosecuting the petitioner at the trial. These clients were the same ones whose tax returns had been audited and in connection with which petitioner

allegedly had bribed the Internal Revenue Service auditors. Statements were taken in writing from some of the clients; in some cases substantiation was shown by the clients to the investigators of the very items allegedly overlooked by the guilty auditors in exchange for petitioner having bribed them. (See affidavits of clients Ripley, Andre, Boland and Davis annexed to the new trial motion).

At the trial, the auditors testified that they saw substantiation of the items under challenge at the audits, but couldn't remember how much, or what amount of disallowance they would have made had they not been bribed. At the very time that the Government put these auditors on the stand, it had in its possession written statements from the same clients on whose behalf the petitioner appeared for the audit, attesting to the fact that the deductions and other challenged items were indeed substantiated, hence the auditors did not conduct a fraudulent audit, and there was no need to "overlook" challenged items.

At the trial, following the completion of the Government's case, defense counsel asked for the production of any statements of taxpayer/clients. The prosecutor first responded by saying he had "nothing at all" and then, after further requests were made, and the Court admonished the prosecutor of his duty of disclosure under *Brady* v. *Maryland*, he responded: "I am saying that the government has nothing whatsoever which would be exculpatory to the defendant under *Brady* v. *Maryland*" (338, 339).

The prosecutor had a duty to disclose the statements to counsel upon request, *Brady* v. *Maryland*, 373 U.S. 83, and could not decide for the defense whether they were ex-

culpatory in nature or useful to the defense, *Thomas* v. *United States,* 343 Fed. 2d 49 (9 Cir., 1965); *Barbee* v. *Warden, Maryland Penitentiary,* 331 Fed. 2d 842 (4 Cir., 1964); *United States* v. *Wilkins,* 326 Fed. 135 (2 Cir., 1964); *Griffin* v. *United States,* 183 Fed. 2d 990, 993 (C.C.A.D.C. 1950).

The vigilance of the prosecutor to see to it that full disclosure is made, *United States* v. *Zborowski,* 271 Fed. 2d 661, 668 (2 Cir.), has recently been iterated by this Court, *Giles* v. *Maryland,* 386 U.S. 66 (1967); *Miller* v. *Pate,* 386 U.S. 1 (1967). See also: *Napue* v. *Illinois,* 360 U.S. 264; *United States* v. *Consolidated Laundries Corp.,* 291 F. 2d 563 (2 Cir. 1961).

Petitioner urges that such concealment, half-evasion or at best, self-judging of relevancy, materiality and usefulness constituted a denial of the petitioner's due process rights.

Petitioner further contends that the government having produced as its witness one of the taxpayer/clients of petitioner (Portman Paget), it was incumbent upon it to produce the other taxpayer/clients as witnesses so that all of the relevant facts and the material evidence would be submitted to the jury. *Rosen* v. *United States,* 245 U.S. 467, 471; *Marshall* v. *United States,* 354 Fed. 2d 999 (9 Cir., 1966).

It was error for the new trial motion based upon the foregoing to have been denied. (Rule 33, Fed. Rules of Crim. Procedure)*

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* The new trial motion, authorized by remand of the Circuit Court, was decided without a hearing and disposed of in a pro forma decision by the trial judge. (Appendix B).

The Circuit Court in its opinion (Appendix A) misconstrued the entire thrust of the new trial motion, believing the issue to be solely whether the taxpayer/clients knew whether petitioner had in fact bribed the auditors, and simply held that whether they knew or did not know that to be the case would not be exculpatory evidence.

CONCLUSION

It is respectfully submitted that the questions raised are of such importance in the administration of criminal law that there should be authoritative determination of the same by this Court. Accordingly, petitioner prays that this Court issue a writ to review the judgment of the Court of Appeals herein.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 73—September Term, 1967.

(Argued September 26, 1967 Decided December 19, 1967.)

Docket No. 30993

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARTIN COHEN,

Defendant-Appellant.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeal from a judgment of conviction entered in the Southern District of New York, Thomas F. Murphy, *Judge,* upon a jury verdict, finding defendant guilty of aiding and abetting the receipt by revenue agents of unlawful fees and of the giving of a gratuity in violation of 26 U. S. C. §7214 (c)(2), 18 U. S. C. §2, and 18 U. S. C. §201(f). Defendant also appeals from the denial of a motion for a new trial. Affirmed.

STANLEY HENDRICKS, New York, N. Y., *for appellant.*

ROBERT L. LATCHFORD, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., Jack Kaplan and Pierre N. Leval, Assistant United States Attorneys, New York, N. Y., on the brief), *for appellee.*

MOORE, *Circuit Judge*:

Martin Cohen (Cohen), defendant-appellant, appeals (1) from a judgment of conviction entered upon a jury verdict, and (2) from the denial of a motion for a new trial. The indictment had named Cohen and five co-defendants and had alleged a conspiracy count and twenty-two substantive counts. Prior to trial, the conspiracy count was dismissed and the five co-defendants pleaded guilty to various counts. The trial therefore proceeded against Cohen alone on counts 2 through 23.

In substance, counts 2 through 11 charged Cohen with giving money to Internal Revenue Service agents to influence their official acts (bribery), 18 U. S. C. Sec. 201, 62 Stat. 69 (Act of June 25, 1948); count 12 involved a 1963 payment to an agent in violation of the amended (1962) and presently effective bribery statute, 18 U. S. C. Sec. 201(b); count 13 charged the defendant with giving a gratuity or other payment not authorized by law to a public official in violation of 18 U. S. C. Sec. 201(f) with respect to the same 1963 payment; and counts 14 through 23 involved the same payments as alleged in counts 2 through 11 but as receipts by the agents of unlawful fees, 26 U. S. C.

Sec. 7214(a)(2) and Cohen's participation therein under the aiding and abetting statute, 18 U. S. C. Sec. 2.

On the trial, the indicted agents who pleaded guilty all testified against Cohen; in defense, Cohen denied the charges. The jury convicted. Were the issuance of veracity the only appellate question, immediate affirmance would be in order. However, the nature of the indictment counts and the jury's resolution thereof, namely, acquittal on counts 2 through 12 and conviction on counts 13 through 23 raise questions not only technical but which, as Cohen argues, may have so confused the jury that he was deprived of a fair trial. Without belittling Cohen's many appellate points, his primary contention would seem to be that the indictment divides the one offense, i.e., payment, into two offenses, payment by Cohen to the agents and receipt by the agents with Cohen the payor, thus aiding and abetting this offense. Cohen asks, in effect, how he could have been acquitted of the bribe payments and have been convicted of aiding and abetting the receiving of the same payment and giving a gratuity. Resolution of these questions requires an analysis of the essential elements of the respective statutes. In addition, consideration must be given to Cohen's argument that *Milanovitch* v. *United States*, 365 U. S. 551 (1961), is controlling and requires reversal.

The Statutes

Section 201, Title 18,[1] makes it a crime to give money to a person acting for any agency of the United States in any official function with intent to influence his decision.

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[1] 18 U. S. C. §201 provides:

"Offer to officer or other person.

"Whoever promises, offers or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or em-

Section 7214, Title 26,[2] on the other hand, merely makes it a crime for a revenue agent to receive compensation,

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ployee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make the opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not less than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

"This section shall not apply to violations of section 212 of this title. (June 25, 1948, ch. 645, 62 Stat. 691.)"

18 U. S. C. §201(b) provides:

"Bribery of public officials and witnesses

"Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

"(1) to influence any official act; or

"(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

"(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

"Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States. Added Pub. L. 87—849, §1(a), Oct. 23, 1962, 76 Stat. 1119."

[2] 26 U. S. C. §7214 provides:

"Offenses by officers and employees of the United States.

except as by law prescribed, for the performance of any duty.

Section 2, Title 18,[3] would apply to Cohen's inducing or procuring the agents' commission of the crime of receiving.

Section 201(f), Title 18,[4] proscribes the giving of a gratuity or other payment not authorized by law to a public

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"(a) Unlawful acts of revenue officers or agents.

"Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * * *

"(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * * *

"shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than five years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution."

[3] 18 U. S. C. §2 provides:

"Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[4] 18 U. S. C. §201(f) provides:

"Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or * * *"

official for or because of any official act performed by that person.

Although it is not for the court to speculate as to the rationale used by the jury to acquit on the bribery counts and to convict on the aiding and abetting receiving counts, the differences in findings requisite to conviction are sufficiently clear. The aiding and abetting counts, unlike the bribery counts, require proof that the Internal Revenue Agent received a fee, not prescribed by law, for the performance of his duty.[5] The bribery counts, unlike the aiding and abetting counts, require proof of a specific corrupt intent to influence official action.[6] From a time standpoint alone, bribery requires that money be given or promised with the intent to influence an official's decision before that decision is reached. The payments in this case were made after the favorable audit reports had been submitted to Cohen and signed by his taxpayer clients. The jury therefore might well have considered that the requisite evidence as to intent was lacking, but that the payments were in the Section 7214 category, and that Cohen enabled the auditors to receive illegal compensation for the performance of their duty because that performance met with his satisfaction, thereby violating 18 U. S. C. §2.

Milanovitch, supra, did not involve these two distinct situations. There the defendant was charged (1) with aiding and abetting stealing certain goods, and (2) with receiving the same stolen goods. The limitations of *Milanovitch* were pointed out recently in *United States* v. *Umans,* 368 F. 2d 725 (2 Cir., 1966), *cert. granted,* 386 U. S. 940

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[5] See *Shuttlesworth* v. *City of Birmingham,* 373 U. S. 262 (1968); *United States* v. *Umans,* 368 F. 2d 725 (2 Cir. 1966), *cert. dismissed,* 36 L. W. 3188 (Nov. 6, 1967).

[6] *United States* v. *Umans, supra.*

(1967), *cert. dismissed, after argument, as improvidently granted,* 36 L. W. 3188 (Nov. 6, 1967). However, even if *Milanovitch* applied, Cohen would have been entitled only to a charge that the jury could have found him guilty of one count or the other as to each transaction. And this is exactly what they did, so that no prejudice is shown.

Cohen also argues that he was acquitted of the bribery charge in count 12 and, therefore, should have been acquitted of giving a gratuity to a public official (count 13). This contention is without merit because the gratuity count, unlike bribery, requires no corrupt intent—it is a lesser form of bribery. See *United States* v. *Umans, supra.*

Improper Joinder

All of the crimes charged were of the same character. Rule 8 (F. R. Crim. Proc.) authorizes joinder of counts in such a situation. No objection to the joinder or motion for a severance was made, although defendant was represented by able trial counsel. Furthermore, the testimony admitted was properly admissible on the aiding and abetting counts.

The Charge

Quite apart from failure to take objections to, and absence of "plain error" in, the charge, Cohen's appellate points are not well taken. Cohen did have "the greatest stake in the outcome of the trial" and the trial court's charge as to possible motive on Cohen's part to fabricate was entirely proper, particularly when coupled with instructions that the jury could also accept Cohen's version of the facts if they chose to do so.

The other objections to the charge now raised on appeal —but as to which no trial objections were taken—involve:

(1) criminal intent under the gratuity count (similar charge approved in *United States* v. *Irwin*, 354 F. 2d 192, 197 n. 3 (2 Cir., 1965);

(2) criminal intent under the aiding and abetting counts (somewhat similar situation in *United States* v. *Umans*, *supra*);

(3) inferences available to the jury from failure to call an available witness who may have had favorable information (see *United States* v. *Comulada*, 340 F. 2d 449, 452 (2 Cir., 1965)); and

(4) the immateriality of the correctness of the tax returns of Cohen's clients.

Analysis of these objections justifies the conclusion that the trial court committed no reversible error.

Improper Admission of Testimony

The jury could have drawn an inference from Cohen's self-introduction to an auditor "as a friend of Gilbert Sherman" that he was to be considered *persona grata* to the auditor co-defendant. The auditor's elaboration of the meaning of this statement—that he "would probably get paid"—was hearsay. However, coupled with the other testimony, this answer does not constitute reversible error. Nor does the reference by the same auditor to the fact that he had stated to the government that there were other guilty accountants rise to this level. Testimony which also referred to other audits in which bribes were given and to which no objection was taken, was properly admitted. See *United States* v. *Bozza*, 365 F. 2d 206, 214 (2 Cir. 1966).

Summation

In context, the part of the government's summation in which the jury was told to acquit the defendant if they believed the government was party to a plot to convict an innocent man was proper. Cohen's claim that the prosecutor's personal belief in the credibility of the witness was expressed is unfounded.

We have considered other errors raised by Cohen but do not find that individually or collectively they constitute reversible error.

The Motion for a New Trial

The motion was properly denied. The taxpayer's knowledge or lack thereof of payments by Cohen to the auditors would not be exculpatory evidence.

Judgment affirmed.

APPENDIX B

Memorandum Decision of United States District Court, Southern District, Denying Motion for New Trial

April 4, 1967

Defendant's motion for a new trial on the grounds that the prosecution suppressed or failed to disclose statements of various taxpayers and for failure of the prosecution to produce such taxpayers on the trial as government witnesses is denied.

This is an order. No settlement is necessary.

/s/ THOMAS F. MURPHY
U.S.D.J.

APPENDIX C

Statutes Involved

TITLE 18 U.S.C. SEC. 2

Sec. 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended October 31, 1951 c. 655, Sec. 17b, 65 Stat. 717.

TITLE 18 U.S.C. SEC. 201.

Sec. 201. Offer to officer or other person.

Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence the decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the

commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years or both.

This section shall not apply to violations of section 212 of this title.

TITLE 18 U.S.C. SEC. 201(b)

(b) Whoever, directly or indirectly corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty.

* * * * *

Shall be fined not more than $20,000. or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust or profit under the United States.

Appendix C—Statutes Involved

TITLE 18 U.S.C. SEC. 201(f)

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official.

* * * * *

Shall be fined not more than $10,000. or imprisoned for not more than two years, or both.

TITLE 26 U.S.C. SEC. 7214(a) (2)

Sec. 7214. Offenses by officers and employees of the United States.

(a) Unlawful acts of revenue officers or agents.—Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation or reward, except as by law prescribed, for the performancy of any duty:

* * * * *

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000. or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

APPENDIX D

Federal Rules of Criminal Procedure Involved

Rule 8. Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief From Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 33. New Trial.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a

new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5 day period.

Rule 52. Harmless Error and Plain Error.

* * * "(b). PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

APPENDIX E

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of December, one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

MARTIN COHEN,
Defendant-Appellant,

JEREMIAH RYAN, *et al.*,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix E
Judgment of United States Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX F

Order of United States Court of Appeals Denying Rehearing

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MARTIN COHEN,

Defendant-Appellant,

JEREMIAH RYAN, *et al.*,

Defendants.

A Petition for a Rehearing having been filed herein by Counsel for the Appellant,

Upon consideration thereof, it is

ORDERED that said petition be and it is hereby Denied.

LEONARD P. MOORE
J. JOSEPH SMITH
IRVING R. KAUFMAN
Circuit Judges

January 16, 1968